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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972

NO. 72-1046

SAN JACINTO JUNIOR COLLEGE, ET AL,
Petitioners,

v.

LECIL HANDER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners San Jacinto Junior College, et al, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 3, 1972.

OPINION

The opinion of the Court of Appeals, 468 F.2d 619, appears as Appendix "A" hereto. The opinion of the United States District Court for the Southern District of Texas, 325 F. Supp. 1019 (1971), appears as Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1972. This Petition for Certiorari was timely filed within 90 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Federal Courts should abstain in cases involving state college regulations pertaining to the grooming of its employees.

2. Whether the Constitution of the United States or any Federal statute prohibits the adoption of grooming regulations for employees by state colleges and universities.

STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment 14:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The plaintiff, a former teacher at San Jacinto Junior College, brought this action for injunctive relief pursuant to 42 U.S.C. §1983 against the college, its president and board of regents. The plaintiff seeks reinstatement and a permanent injunction against the enforcement of a grooming regulation adopted by the board of regents of the college on December 22, 1970, applicable to faculty members and male employees of the college.

The plaintiff was employed by the college as a full-time instructor in September of 1969. Although at that time there was no written policy concerning the grooming of faculty members, there was an unwritten policy to the effect that such employees were not permitted to wear beards. While employed at the college, plaintiff grew a beard in the summer of 1970. Shortly after the promulgation of the written regulation in December of 1970, plaintiff was informed by the administrative officials of the college that he must shave his beard. At the conclusion

of a hearing before the board of regents held on January 14, 1971, plaintiff was given until January 18th to either comply with the regulation or be discharged. Plaintiff refused compliance, his employment was terminated, and he was paid the remainder of his salary under his contract for the school year 1970-1971.

As we view the case, there are only two questions for determination by the Courts. The first is whether a grooming regulation applicable to faculty members and employees of a state junior college violates the Constitution or any statute of the United States? If this question be answered in the negative, there is nothing further for determination by this court or any other court. If it be answered in the affirmative, then the question arises as to whether Federal courts should abstain from exercising their jurisdiction in this type of action pending a state determination of state issues.

After two days of hearings before the Honorable Carl O. Bue, United States District Judge, the Court found that abstention was proper in cases of this nature and ordered the action dismissed. Judge Bue's opinion, which did not pass upon the Constitutional issues, if any, is attached as Appendix "B" to this Petition. In a one-sentence opinion, the United States Court of Appeals for the Fifth Circuit reversed and remanded this case for consideration in light of *Lansdale v. Tyler Junior College*, ____F.2d____, a Fifth Circuit case declaring unconstitutional grooming regulations applicable to college *students*. We now petition for Certiorari in the belief that this case presents the perfect vehicle for a final determination by this Court of the role of Federal courts in supervising the administration of state colleges and universities.

REASONS FOR GRANTING THE WRIT

A. The Circuits are in hopeless conflict with regards to the constitutional limits to which state colleges, schools, and universities may impose grooming regulations on students, faculty, and employees.

The last several years the federal courts in this country have found their dockets cluttered with cases challenging various grooming regulations promulgated by state public schools, colleges, and universities. Both students and school authorities have found themselves at the mercy and whim of the federal district court which, in some circuits, has determined that what would seem the most trivial of matters is a proper subject for adjudication by federal courts. Grooming regulations are valid or invalid depending on which federal court one has the fortune or misfortune of appearing before. We submit that the time has come for this Court to put an end to this intolerable situation, and allow courts and school authorities to press ahead with the serious problems facing the country today.

No one can accuse the various circuits of being unimaginative in dealing with the problems that are presented. This Court is undoubtedly familiar with the approaches taken by the various circuits in deciding grooming cases. We hope that a rather brief recitation of the applicable case law will be sufficient to reacquaint this Court with the quagmire that federal courts have created for themselves in the last several years.

The late Mr. Justice Black, acting on an "Emergency Motion to Vacate a Stay of Injunction Pending Appeal," in *Karr v. Schmidt*, 401 U.S. 1201 (1971), set out what we consider to be a rational view of the entire area of

controversy concerning dress regulations in public schools and colleges. In order that this very rational view may be contrasted with the approach of the various circuits, we quote from that opinion at length:

I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. It is true that we have held that this Court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run their school system in accordance with their own best judgment as to the appropriate length of hair for students.

The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as "Emergency Motion" and "harassment" and "irreparable damages" are calculated to leave the impression that this case over the length of hair has created or is about to create a great national "crisis." I confess my inability to understand how anyone would thus classify this hair length

case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States. Perhaps if the courts will leave the States free to perform thir own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

401 U.S. at 1202-03.

As was his custom, Mr. Justice Black squarely met the real issues presented in cases of this nature. Unfortunately, not all federal courts have viewed the issues in the same way. The Fifth Circuit is a classic example of the cur-

rent confusion concerning the role of federal courts in supervising school administrators in the execution of their most trivial duties. In *Karr v. Schmidt*, 460 F.2d 609 (1972), that Court directed lower courts to grant an immediate Motion to Dismiss for failure to state a claim for which relief can be granted when the Complaint merely alleged the constitutional invalidity of a high school hair and grooming regulation. The Court held that the asserted freedom of a high school student to wear hair in school at the length that suited him did not rise to the level of fundamental significance which would warrant a Court's recognition of a substantive constitutional right.

The Fifth Circuit, however, using logic we confess not completely to understand, held in *Lansdale v. Tyler Jr. College*, ____ F.2d ____ (1972), that when considering grooming regulations applicable to university and college students, District Courts should per se strike down these regulations. That Court felt that the right of a college student to wear his hair at a length he pleased somehow rose to the level of a constitutionally protected right. We confess to be completely mystified by the constitutional right which springs full blown at the moment an individual leaves high school and enters college. Perhaps the most unfortunate thing in all this is that such a lapse of logic becomes typical when Federal courts become trapped in the quagmire they are currently in. We submit that only this Honorable Court can extricate them from this self-made trap, and can restore order to the law of the various circuits.

As an example of the confusion in the circuits, we respectfully cite to this court the case law in those circuits,

together with a brief summary of the approach taken by each. In *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970), the First Circuit held that a high school student's complaint over a hair length regulation did not raise a First Amendment question, nor was it included in those rights guaranteed by this Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). However that court held that the due process clause of the Fourteenth Amendment established a sphere of personal liberty for every individual, subject to reasonable intrusion by the State in furtherance of legitimate State interest. It concluded that this concept of liberty embraced the right to wear one's hair as he wished. It further found no State interest which would justify an intrusion on this guaranteed liberty. Not so, said the Sixth Circuit in *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), cert. denied 400 U.S. 850, and *Gfell v. Rickelman*, 441 F.2d 444 (6th Cir. 1971). That Court found that hair regulations did not contravene either the First, Third, Fourth, Fifth, Ninth, or Fourteenth Amendments.

The Seventh Circuit, however, was not so reluctant in imposing its wisdom on school administrators. In *Breen v. Kahl*, 412 F.2d 1034 (7th Cir. 1969), cert. denied 398 U.S. 937, and *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970) that Court held that the right to wear one's hair at any length or in any desired manner is an "ingredient of personal freedom" protected by the United States Constitution. Although the Court could not decide whether this right was within the penumbras of the First Amendment or encompassed within the Ninth Amendment, it was certain that such a right clearly exists and was applicable to the states through the due process clause of the Four-

teenth Amendment. Specifically, that Court found *Griswold v. Connecticut, supra,* applicable to this situation. In *Crews,* the Court went even further and held that a showing of disruption and interference in school activity was not enough to validate a regulation concerning a school boy's hair. It somehow equated this "right" with that of free speech and applied the principles enunciated by this Court in *Terminiello v. Chicago,* 337 U.S. 1 (1949). The Ninth and Tenth Circuits, following the lead of the Fifth and Sixth Circuits, have held that the length of a student's hair does not raise a constitutional question. The Ninth Circuit in *King v. Saddleback Jr. College District,* 445 F.2d 932 (9th Cir. 1971) differed with the later holding of the Fifth Circuit and held that grooming regulations were valid whether promulgated by high schools or junior colleges. That Court recognized the primary issue, so often overlooked in cases of this nature. It stated:

> This is not a question of preference for or against certain male hair styled or the length to which persons desire to wear their hair. This Court could not care less. It is a question of the right of school authorities to develop a code of dress and conduct best conducive to the fulfillment of their responsibility to educate, and to do it without unconstitutionally infringing upon the rights of those who must live under it. . . . A court might disagree with their professional judgment, but it should not take over the operation of their schools. *Id.* at 940.

The Tenth Circuit in *Freeman v. Flake,* 448 F.2d 258 (10th Cir. 1971), cert. denied 405 U.S. 1032, also held that a constitutional issue was not raised by a regulation

controlling the grooming of students. It quoted this Court's language in *Epperson v. Arkansas*, 393 U.S. 97 (1968), when this Court said "By and large, public education in our Nation is committed to the control of State and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* at 104. The Tenth Circuit therefore ordered that complaints based on school regulations concerning the length of a male student's hair be dismissed for failure to state a claim on which relief can be granted.

But the Fifth Circuit, in the case at bar, has gone one step further. It has remanded a case involving a grooming regulation applicable to teachers and employees for consideration by the District Court in light of its opinion on student grooming regulations in junior colleges. That Court, thus, is in effect saying that a state educational institution above the high school level can regulate the grooming and appearance of its teachers, instructors, and employees no more than it can its students. This is utter nonsense, and that Court has now gone the limit in interfering with state and local authorities constitutional and statutory responsibility to operate its own school system. We do not, of course, contend that either a student or a public employee leaves his constitutional rights at the school house door. This Court has rejected that argument, and rightly so. What we do contend is that the Constitution of the United States in no way guarantees any individual the right to wear his hair in a length he chooses, or, in this case, to have a beard. If the states are not capable of dealing with a matter so trivial as the regula-

tion of dress and grooming of public employees, then the concept of Federalism no longer has any place in the governing of these United States.

It is not for us to argue the wisdom of the regulation which is central to this law suit. Neither is it for this Court nor any other court to decide the wisdom of that regulation. Something far more important is at stake, something no less central to our ideal of government than the separation of powers between the states and the Federal government.

B. The Fifth Circuit's complete refusal to consider the District Court's decision on abstention in cases of this nature has dealt a serious blow to traditional notions of comity.

In the case at bar, the District Court decided to abstain from deciding Federal Constitutional questions, if any, pending a state determination of state issues. Although the opinion is not entirely clear, the District Court apparently relied both on *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941) and *Burford v. Sun Oil Company*, 319 U.S. 315 (1943). That Court recognized that Plaintiff's grievances could be adequately litigated in state court, and that any relief to which he may be entitled can be given to him by the state court. This relief includes both the possibility that the school administrators may have exceeded their statutory authority, and also the possibility that the regulation in question may violate either the state or Federal Constitutions, or both. The District Court also acknowledged that Federal Courts must be sensitive to the legitimate interests of state governments.

It based its decision, in part, on the spirit of comity. We submit that the abstention doctrine is particularly suited to cases of this nature. As Justice Black pointed out in *Karr v. Schmidt, supra,* the Federal courts can perform no greater service than to leave the states unhampered in the execution of their purely local responsibilities. Surely no responsibility is more local in nature than the regulation of the grooming of employees and students of state colleges and universities. It is inconceivable to us that the Federal judiciary would feel itself more qualified to deal with the problems and administration of local schools than state administrators, state legislatures, and state courts. We submit that it is time for this court to make clear to Federal District and Circuit Courts that it is not their responsibility to prescribe, or strike down, grooming regulations for state schools, colleges and universities. We submit that it is time that this Court order that such cases now crowding the dockets of our courts be dismissed. We submit that it is time for this Court to make it clear that the Constitution of the United States did not intend that the Federal judiciary supervise local educational authorities in the name of protecting rights guaranteed thereunder. We submit that it is time that this Court made clear to lower Federal courts that local and state authorities are fully capable of managing their affairs in certain areas, and that the supervision of the Federal District Court is not necessary for every decision which can under some conceivable theory violate a constitutional "right".

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of January, 1973, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, certified, return receipt requested, to Mr. John G. Abbott, Attorney at Law, 600 Houston Bar Center, Houston, Texas 77002, Counsel for the Respondent. I further certify that all parties required to be served have been served.

B. JEFF CRANE, JR.
Counsel For Petitioner

"APPENDIX A"

Lecil HANDER, Plaintiff-Appellant,

v.

SAN JACINTO JUNIOR COLLEGE
et al., Defendants-Appellees.

No. 71-2074
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 3, 1972.

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

The judgment of the district court, 325 F. Supp. 1019, is vacated and the cause is remanded for further consideration in the light of Lansdale v. Tyler Junior College, 5 Cir. 1972, ____F.2d____.

"APPENDIX B"

Lecil HANDER

v.

SAN JACINTO JUNIOR COLLEGE et al.

Civ. A. No. 71-H-52.

United States District Court,
S. D. Texas,

Houston Division.

April 9, 1971.

MEMORANDUM OPINION

BUE, District Judge.

This is an action for injunctive relief, pursuant to 42 U.S.C. § 1983, against San Jacinto Junior College, its president and board of regents. Specifically, plaintiff seeks reinstatement and a permanent injunction against the continued enforcement of an appearance regulation against himself and other faculty members of the college. Plaintiff was discharged from his position as biology instructor at the college on January 11, 1971. The facts that led to this discharge will be briefly summarized. In September of 1969 plaintiff was hired as a full-time instructor at the college. The college had an unwritten policy at the time to the effect that faculty members are not permitted to wear beards. In violation of this policy, plaintiff grew what might be termed a "full" beard in the summer of 1970. On December 22, 1970, the board of regents of

the college promulgated, pursuant to their statutory authority to control and manage the college the following regulation:

> Faculty members and all of the male employees of San Jacinto Junior College are required to be clean shaven, wear reasonable hair styles and have no excessively long sideburns.

Shortly thereafter, plaintiff was informed by administrative officials of the college that he must comply with this regulation. At plaintiff's request, a hearing was held on January 14, 1971, before the board of regents to discuss the propriety of plaintiff wearing a beard and violating the college's written regulation. Both plaintiff and his counsel were present at this hearing. At the conclusion of the hearing, plaintiff was given until January 18 either to comply with the regulation or be discharged. After plaintiff refused compliance, his employment was terminated, and he was paid the remainder of his salary for the school year 1970-71.

The parties are in agreement that plaintiff was discharged solely because he refused to comply with the college's appearance regulation. Plaintiff asserts that the regulation constitutes an unreasonable classification in violation of the equal protection clause of the Fourteenth Amendment. It is further alleged that the regulation was enacted to implement the personal tastes of the college officials and, as a result, is not reasonably related to the statutory authority of the board of regents to control and manage the college. Plaintiff, however, does not contend that the wearing of a beard is a mode of freedom of speech or expression under the First Amendment, nor that it is protected as a right to privacy. Additionally,

plaintiff does not contend that he was discharged in a manner so as to deny him procedural due process.

Defendants, on the other hand, contend that the wearing of a beard is a mere "style" of appearance and is not constitutionally protected. More importantly, defendants assert that this court should abstain from decision, since the regulation was promulgated pursuant to a state statute and, therefore, should be interpreted in a state court pursuant to state law.

San Jacinto Junior College is a public junior college organized under the laws of, and financially supported by, the State of Texas.[1] The defendants have acted under color of state law in promulgating the appearance regulation and in discharging plaintiff. This Court has jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

[1-4] Initially, with regard to plaintiff's position as a public employee it should be acknowledged that a person does not have a constitutional right to government employment. This means that an employee "must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." Slochower v. Board of Higher Education, 350 U.S. 551, 555, 76 S.Ct. 637, 640, 100 L.Ed. 692 (1956). As a result, the states have a broad, but not unlimited, leeway in establishing the terms of public employment. Battle v. Mulholland, 439 F.2d 321 (5th Cir. 1971). The states also have an interest, as an employer, in regulating their employees in ways more restrictive than citizens who are not employees.

1. The college is classified as a Union Junior College District and was established pursuant to Art. 2815h, Tex. Rev. Civ. Stat. Ann. (now Tex. Educ. Code Ann. §§ 51.004, 51.031-43, 51.063-65). It is a state educational agency.-*See* Dealey v. Dallas County Junior College District, 434 S.W.2d 724 (Tex. Civ. App.—Waco 1968, writ ref. n.r.e.).

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Therefore, the rights of the employees as citizens must be balanced against the state's interest in promoting efficient public service. Battle v. Mulholland, *supra;* Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). However, an employee of a state agency has certain constitutional protections against exclusion from that employment on patently arbitrary or discriminatory grounds. Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

To ascertain the basis for the regulation now questioned, it is necessary to start with the Texas Constitution which provides that:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.[2]

One of the statutes enacted to implement this provision provides for the creation of public junior colleges in the state. Further, the Coordinating Board of the Texas College and University System was granted the power to exercise general control over the public junior colleges.[3]

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2. Tex. Const. Ann. art. VII, § 1, Vernon's Ann. St.

3. Tex. Educ. Code Ann. § 51.001(a). This includes the authority to "adopt standards for the operation of public junior colleges and [to prescribe] the rules and regulations for such colleges." *Id.* at (b)(3). Section 51.002(b) provides that:

> All authority not vested by this chapter or by other laws of the state in the coordinating board or in the Central Education

Section 51.040 of the Texas Education Code, U.T.C.A. indicates that:

> A union junior college, a county junior college, or a joint-county junior college shall be governed, administered, and controlled by and under the direction of a board of trustees of seven members.

The board of trustees may vest this control in a board of regents. Tex. Rev. Civ. Stat. Ann. art. 2815k; Tex. Educ. Code Ann., Section 51.085.[4] As can readily be seen the statutes above stated provide for a general grant of power to the board of regents for the control and operation of the junior college.

[5, 6] While general grants of power to administrative agencies are permissible to regulate some activities, other types of activities, such as personal liberties, can be regulated only pursuant to the lawmaking functions of a legislature. If that power is delegated, then there must be acceptable standards included within that delegation so that the agency can follow the policy of the statute. *See* Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). In other words, the legislature must determine the policy of the law, and this function cannot be delegated. Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). The legislature can, however, authorize administrative officials to prescribe rules and regulations to implement the legisla-

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Agency is reserved and retained locally in each of the respective public junior college districts or in the governing boards of such junior colleges as provided in the laws applicable.

4. *See also* Tex. Educ. Code Ann., § 21.209; Tex. Rev. Civ. Stat. Ann., art. 2815k, § 3.

tive enactments. This delegation should be specific to prevent intervention into protected activities of individuals. *See* Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

It is apparent that the Texas legislature has not authorized the regulation of the personal appearance of faculty members of public junior colleges nor authorized their discharge for violation of such regulations. They have, however, delegated to the board of regents the power to manage and control these institutions. As a result, the question would arise as to whether or not the board of regents exceeded their statutory authority in promulgating the appearance regulation. In this connection, it should be noted that it is well established in Texas that if a rule, order, or regulation promulgated by an agency exceeds the authority conferred by the statute, conflicts with the statute, or has no reasonable relation to the purpose of the statute, then it is not sustainable by the Texas courts. Rudman v. Railroad Comm., 162 Tex. 579, 349 S.W.2d 717 (1961); Teacher Retirement System v. Duckworth, 260 S.W.2d 632 (Tex. Civ. App.—Fort Worth 1953), opinion adopted, 153 Tex. 141, 264 S.W.2d 98 (1954); Kissick v. Garland Independent School District, 330 S.W.2d 708 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.); Passel v. Fort Worth Independent School District, 453 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); Hailey v. Brooks, 191 S.W. 781 (Tex. Civ. App.—Fort Worth 1916, writ ref'd). See Cornette v. Aldridge, 408 S.W.2d 935 (Tex. Civ. App.—Amarillo 1966, writ mandamus overruled).

The foregoing analysis has led this Court to question the permissibility of exercising jurisdiction over this matter. Abstention is recognized by federal courts when a decision

On the basis of a federal constitutional question can be avoided because the case may be disposed of on questions of state law. Railroad Comm. v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); Harris v. Samuels, 440 F.2d 748 (5th Cir. 1971). In Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 640-641, 79 S.Ct. 455, 456, 3 L.Ed.2d 562 (1959) it was stated that:

> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions * * * That is essentially desirable where the questions of state law are enmeshed with federal questions. * * * [W]hen the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand lest it render a constitutional decision unnecessarily.

This principle was reaffirmed in Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970). Further, in Harris v. Samuels, supra, the Fifth Circuit Court of Appeals refused to exercise jurisdiction over a dispute which involved the propriety of a local board's actions, pursuant to a state statute, involving voting rights. It was indicated that:

> In a matter of such importance to the States and their governments, a federal court should be slow to intervene, but should instead avoid needless conflict with the administration by the State of its own affairs.

440 F.2d at 752. It cannot be denied that public education, including public institutions of higher learning, are of paramount interest to state and local governments in much the same way as are voting rights. *See* Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

The avoidance of needless conflict with state administration is primarily a matter of comity. This principle has recently been reaffirmed in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). In *Younger*, it was stated that:

> What the concept [comity] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

401 U.S. at 44-45, 91 S.Ct. at 750.[5]

Recent decisions involving many varied areas of state concern have approved the principle that when a determination by a state court could end the litigation without the necessity of decision on a federal constitutional claim, then the federal court should abstain from decision. Coleman v. Ginsberg, 428 F.2d 767 (2d Cir. 1970); Florida

5. *See* Wisconsin v. Constantineau, 400 U.S. 433, 439-443, 91 S.Ct. 507, 27 L.Ed.2d 515, 520-522 (1971) (Chief Justice Burger dissenting).

Poultry Federation, Inc. v. Conner, 319 F. Supp. 158. (N.D. Fla. 1970) (Three-Judge Court); Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970); Sanchez v. Wyman, 318 F. Supp. 827 (S.D.N.Y. 1970); Allegheny Airlines, Inc. v. Pennsylvania Public Utility Comm., 319 F. Supp. 407 (E.D. Pa. 1970); Varian Associates v. Santa Clara, 317 F. Supp. 888 (N.D. Cal. 1970); Gold v. Lomenzo, 314 F. Supp. 871 (S.D. N.Y. 1970); Haakenson v. Parkhouse, 312 F. Supp. 929 (E.D. Pa. 1970); Fhagen v. Miller, 312 F. Supp. 323 (S.D. N.Y. 1970).

It is quite likely that a state court decision interpreting these statutes and regulation will foreclose any need for a decision by this Court of a federal question. As previously indicated, the Texas state courts could find that the actions of the board of regents violated the authority delegated to them by the legislature. Additionally, the Texas state courts could find that the statutes or regulation violate either the due process or equal protection clauses of the state constitution. *See* Tex. Const. Ann., art. I, §§ 3, 19; Abney v. Fox, 250 S.W. 210, 212 (Tex. Civ. App.—Austin 1923, writ ref'd); Zucht v. San Antonio School Board, 170 S.W. 840, 843 (Tex. Civ. App.—San Antonio 1914, writ ref'd); *See generally,* House of Tobacco, Inc. v. Calvert, 394 S.W.2d 654 (Tex. Sup. 1965); Kissick v. Garland Independent School District, 330 S.W.2d 708 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.).

The Court takes this position in recognition of the legitimate activities of the state in protecting state interests, one of which is the state's interest in having the validity of state statutes and regulations passed upon in the state

courts. Furthermore, this Court is well aware of recent pronouncements to the effect that "hair cases" should be tried in a state court because that is a more proper forum.[6]

[7, 8] As a result, and for the foregoing reasons, this Court will abstain from exercising its jurisdiction to pass upon the constitutional questions presented herein. This action is hereby dismissed. The Court recognizes that in this type of situation retention of jurisdiction pending a state determination of the state issues, rather than dismissal of the action, has been viewed generally as the more appropriate course to follow. However, in view of the recent trend in this area of the law as well as the special circumstances presented in this instance, it is concluded that dismissal is proper. These special circumstances include: (1) The fact that plaintiff's grievances can be adequately litigated in state court; (2) The fact that public education, including public institutions of higher learning, constitute a paramount interest to state and local governments;[7] and (3) The fact that federal courts must acknowledge a sensitivity to the legitimate interests of the state governments. It is in this broad spirit of comity without regard to other aspects of this case that the decision of this Court is reached.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law.

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6. *See* Karr v. Schmidt, 401 U.S. 1201, 91 S.Ct. 592, 27 L.Ed.2d 797 (1971) (on motion to vacate a stay of injunction pending appeal) (Justice Black, Circuit Justice), motion denied, 401 U.S. 930, 91 S.Ct. 914, 28 L.Ed.2d 211 (1971); Alberda v. Noell, 322 F. Supp. 1379 (E.D. Mich., 1971).

7. *See generally* Press v. Pasadena Independent School District, 326 F. Supp. 550 (S.D. Tex., March 4, 1971).

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1046

SAN JACINTO JUNIOR COLLEGE, ET AL,
Petitioners,

v.

LECIL HANDER, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

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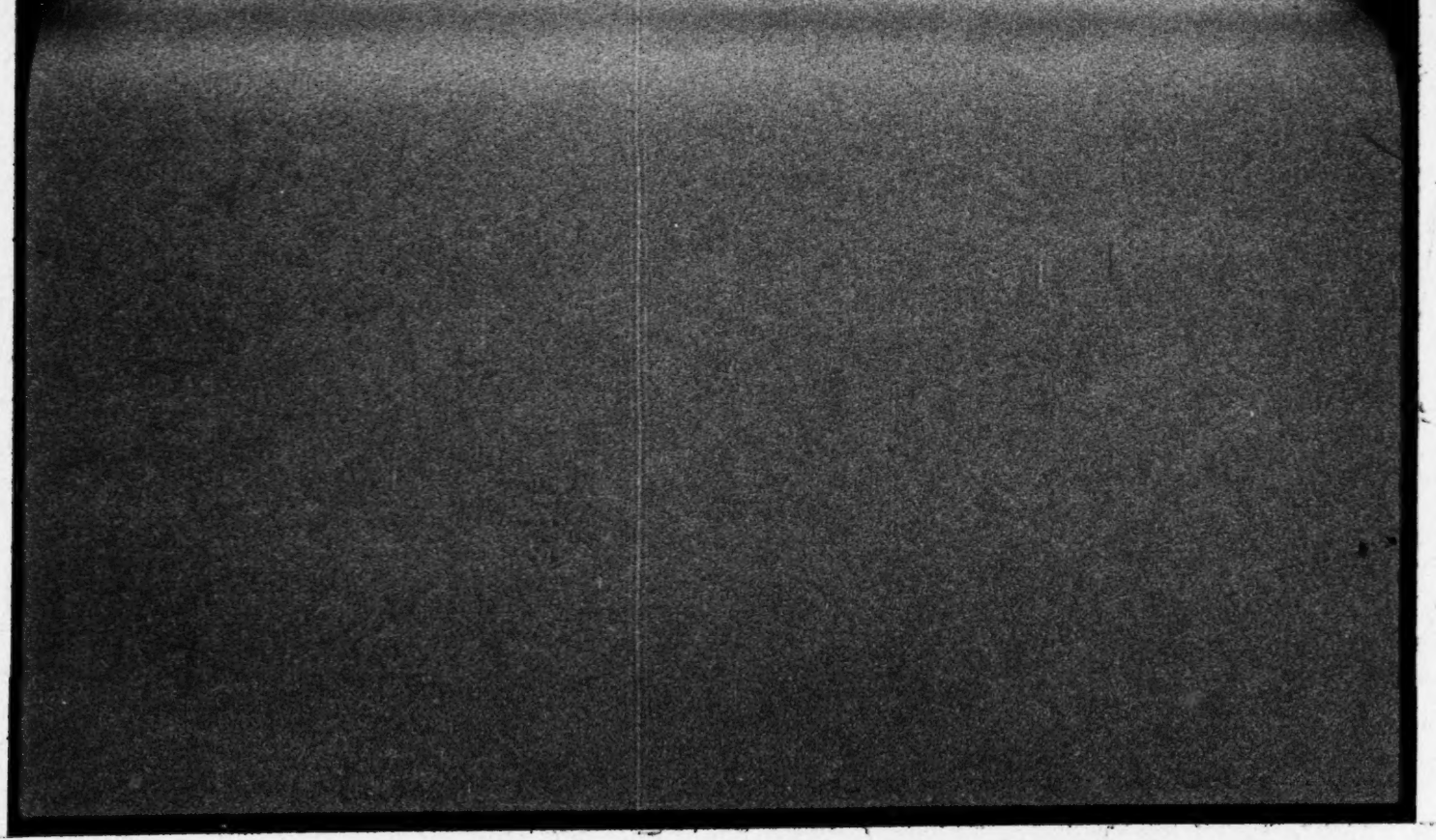

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NO. 72-1046

SAN JACINTO JUNIOR COLLEGE, ET AL,
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v.

LECIL HANDER, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION

The opinion of the Court of Appeals, 468 F.2d 619, and the opinion of the United States District Court for the Southern District of Texas, 325 F.Supp. 1019 (1971), is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Whether Federal Courts should abstain in cases involving state college regulations pertaining to the grooming of its employees.

2. Whether the Constitution of the United States or any Federal statute prohibits the adoption of arbitrary and capricious grooming regulations for employees by state colleges and universities.

STATEMENT OF THE CASE

In September, 1969, Lecil Hander, plaintiff-appellant, was hired by defendant-appellee, San Jacinto Junior College, a public junior college of the State of Texas, as a full-time instructor in biology. At that time the College had a written policy prohibiting long hair and beards on male students. This policy was not applicable to the faculty members; however, Mr. Hander as an instructor at the College was "expected to go along" with the student policy.

Then, on November 17, 1969, United States District Judge John Singleton, Jr., enjoined the College from enforcing its student beard policy in the case of *Carlos Calbillo v. San Jacinto Junior College*, 305 F.Supp. 857 (S.D. Tex. 1969). Thereafter, both students and faculty were allowed to grow beards. Mr. Hander grew his beard in the summer of 1970, and taught without incident during the fall semester 1970.

On December 22, 1970, the Board of Regents of the College re-adopted its student beard rule and at the same time adopted its written policy regarding faculty members, which policy read as follows:

> "Faculty members and all other male employees of San Jacnto College are required to be clean shaven, wear reasonable hair styles, and to have no excessively long sideburns."

After Mr. Hander was informed of the new policy, a hearing was held before the Board of Regents on January 14, 1971, on the issue of his beard, the new policy, and his continued employment as a biology instructor at the College. Following the hearing, his employment with the College was terminated, he was paid the remainder of his contractual salary for the school year 1970-71, and suit was instituted on his behalf and on behalf of all other male faculty members and employees of the College, seeking reinstatement for Mr. Hander and an injunction against the College's enforcement of the faculty beard policy.

After the hearing on plaintiff's requested injunctive relief, but before a decision had been reached, Judge Singleton in the *Calbillo* case referred to above, issued the following Order:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLOS CALBILLO

v.

SAN JACINTO JUNIOR COLLEGE,
to-wit: DR. O. W. MARCOM, et al

CIVIL ACTION NO. 69-H-1012

ORDER CORRECTING CLERICAL ERROR

It appearing to the satisfaction of this court that the signing and entry on December 31, 1970, of an order entitled "Order Dissolving Preliminary Injunction and Dismissing Cause of Action" was a clerical mistake in that said order through inadvertence failed to set amended

regulation of San Jacinto Junior College pertaining to dress and decorum on the part of male students, which amended regulation should have contained no reference to beards or clean-shaven faces for male students.

Accordingly, it is ORDERED that said order of December 31, 1970, be, and the same is hereby, changed so as to include the following:

> "It is further ORDERED, ADJUDGED, and DECREED that the regulations of San Jacinto Junior College pertaining to dress and decorum on the part of male students shall read as follows:
>
> 'Male students at San Jacinto Junior College are required to wear reasonable hair styles and to have no excessively long sideburns.' "

Except as amended herein, said order of December 31, 1970, shall remain in effect as entered.

The clerk of this court is directed to immediately file this Order and to send copies thereof to all counsel of record.

DONE at Houston, Texas, this 25th day of January, 1971.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

This Order was filed on February 9, 1971. Thereafter, on April 9, 1971, United States District Judge, Carl O. Bue, Jr., issued a memorandum opinion in the instant case, in which opinion the Court abstained from deciding the issues presented and dismissing the action.

The United States Court of Appeals for the Fifth Circuit reversed and remanded this action for a decision to be made on the merits. 468 F.2d 619.

ARGUMENT

The decision below can be sustained on the ground that the doctrine of abstention was misapplied in the District Court, and the fact that the circuits are in conflict regarding grooming regulations on students does not constitute an adequate reason for the grant of certiorari.

In the instant case, neither the District Court, nor the Fifth Circuit have ruled on the merits of the respondent's constitutional claim. This case does not involve high school students or a high school setting. Nor does it involve more mature college students. What it does involve is whether a public college may require a 30-year old male biology instructor, who is a husband and father, to wear only college-approved hair styles (not including his neatly trimmed beard) as a condition of his continued employment by the college.

Respondent respectfully submits that the issue in conflict among the circuits in regards to grooming regulations of public school students "can await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

In *Monrosa*, where a Writ of Certiorari was dismissed as evidently granted, this Court recognized that the question which led to the Grant of Certiorari was more or less academic, since the Court of Appeals decision could be sustained on an independent, alternative ground. Mr. Justice Brennan stated:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not singly administrative or managerial. Resolution here of the . . . [issues in conflict] can await the day when the issue is posed less abstractly." 359 U.S. at 184.

This case can be sustained on the ground that the Fifth Circuit correctly reversed and remanded the district court's decision to abstain from deciding Federal constitutional questions. Certiorari should not be granted to review the constitutionality of grooming regulations applicable to public school students when that issue is only abstractly present in the instant case.

In the instant case, the District Court applied the abstention doctrine and refrained from exercising its jurisdiction to decide the Constitutional issue presented on the ground that a state court decision interpreting the general statutory grant of power to junior college boards or regents and interpreting the validity of the College beard policy would foreclose the necessity for a federal court decision on the federal Constitutional question presented. That holding misapplies the abstention doctrine as it has developed in the federal courts since *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941).

The basis of the doctrine is a sound one. Judicial economy, comity between the federal and state judicial systems, and avoidance of unnecessary federal Constitutional decisions are the more important worthwhile objectives of the doctrine. However, the abstention doctrine was never intended to apply in such a way as to deprive a plaintiff of his federal remedy.

From the *Railroad Commission* case, supra, to the present, the abstention doctrine has been applied "only in narrowly limited 'special circumstances.' " *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 395 (1969). Most often, those special circumstances arise where the plaintiff raises two issues of law, one involving the construction of a state statute or a state Constitutional provision, and the other involving a federal Constitutional problem. In the *Railroad Commission* case, supra, the plaintiffs asserted that both Texas law and the United States Constitution forbade an order of the Railroad Commission regulating the presence of conductors on passenger train sleeping cars. This Court held that the Constitutional questions raised by the plaintiffs should not be passed on by the federal courts until the validity of the order was reviewed in the Texas state courts under the applicable Texas statute. "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the Constitutional issue does not arise." 312 U.S. at 501. Again, in *Reetz v. Bozanich*, 397 U.S. 82, 90 S.Ct. 788 (1970), the plaintiffs raised issues of state law as well as federal Constitutional questions relating to newly adopted Alaska fishing rights statutes. This Court held that the abstention doctrine should only be applied "Where the issue of state law is uncertain. . . . A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." 397 U.S. at 86-87.

The common thread running through these opinions is that (a) where a plaintiff raises both a state claim and a federal Constitutional claim in federal court, (b) where

the issue of state law is uncertain, (c) where a state court construction favorable to the plaintiff could avoid the federal Constitutional question, and (d) where the federal court would otherwise be in a position of construing a state issue in advance of an authoritative ruling by a state court, then the federal court should abstain from deciding either of the issues since (e) the federal court decision on the state issue could irritate the federal-state relationship, and (f) the federal court decision on the Constitutional issue could be an unnecessary one.

Neither the policy considerations underlying the abstention doctrine nor the case law applying it justified the application of the doctrine to the instant case. Plaintiff-appellant, Lecil Hander, in his complaint and in the District Court proceedings has never contended that the College beard policy was in violation of state law or the state Constitution. It is the defendants-appellees who have raised the question, placing themselves in the unusual position of alleging a possible violation of state law by the College: "Thus it is conceivable that the state courts themselves would strike the college's rule." Plaintiff-appellant has not asked the District Court to pass on any issue of state law, and therefore there could be no possible irritant in the federal-state relationship. *Reetz v. Bozanich,* supra.

Second, there is nothing on the face of the College's beard policy, the state laws relating to public junior colleges, or provisions of the state Constitution which indicate that a state court interpretation would avoid or modify the federal Constitutional question. The provision of the Texas Constitution relied on by the District Court as the basis for the College beard policy states simply that:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

Texas Constitution, Art. VII, sec. 1. The Texas Education Code provides only that:

> "A union junior college, a county junior college, or a joint-county junior college shall be governed, administered, and controlled by and under the direction of a board of trustees of seven members."

Tex. Ed. Code, sec. 51.040. Both are general grants of power to regulate public schools. The District Court then declared it to be an unsettled question of state law whether the College could pass the beard policy it did pursuant to this general grant of power for the control and operation of a junior college.

Such reasoning does not follow the tests necessary before a federal court should abstain from deciding the merits of a plaintiff's Constitutional claim. In *Zwickler v. Koota,* supra, this Court quoted with approval the following language from *United States v. Livingston,* 179 F.Supp. 9, 12-13 (D.C.), aff'd *Livingston v. United States,* 364 U.S. 281, 80 S.Ct. 1611 (1960):

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal Constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."

389 U.S. at 251, 88 S.Ct. at 397. Respondent respectfully contends that the Texas statutory and Constitutional provisions are of such a general nature that they are not "fairly subject to an interpretation which will avoid or modify the federal Constitutional question." This would necessarily mean an interpretation favorable to the plaintiff; otherwise, the federal Constitutional issue would remain were the state issue resolved against the plaintiff, and attendant expense and delay would have occurred in the meantime. As an example of the difficulties a plaintiff may find himself in where the federal court and not the plaintiff has raised the state issue, and then abstains, see *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461 (1964).

Besides, the extent to which public school district regulations such as the one in question here are sustainable is not an unsettled question of Texas Law. Quite to the contrary, it is well settled in Texas that a school regulation is sustainable if there is any reasonable relationship between the regulation in question and the proper operation of the school. See *Passel v. Fort Worth Independent School District,* 453 S.W.2d 888 (Tex. Civ. App. 1970), ref. n.r.e.; *McLean Independent School District v. Andrews,* 333 S.W.2d 886 (Tex. Civ. App. 1960); *Kissick v. Garland Independent School District,* 330 S.W.2d 708 (Tex. Civ. App. 1960), ref. n.r.e.; *Romeike v. Houston Independent School District,* 368 S.W.2d 895 (Tex. Civ. App. 1963). See also *Ferrell v. Dallas Ind. Sch. Dist.,* 392 F.2d 697, 701-702 (C.A. 5, 1968).

Additionally, the District Court in applying the abstention doctrine to the instant case has overlooked the fact that this is an action brought under the Civil Rights Act of 1871, 42 U.S.C. 1983. In *Monroe v. Pape,* 365 U.S.

167, 81 S.Ct. 473 (1961), this Court reviewed the legislative history and purpose of section 1983 and concluded that:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved."

365 U.S. at 183, 81 S.Ct. at 482. This Court reaffirmed their holding in *Monroe* supra, regarding the supplementary nature of section 1983, in *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963), which held that the plaintiffs did not have to look to state law first regarding their complaint of racial discrimination:

> "We would defeat those purposes [of section 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."

373 U.S. at 672, 83 S.Ct. at 1436. This Court went on in *McNeese* to distinguish the section 1983 claim from the abstention cases:

> "Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law."

373 U.S. at 674, 83 S.Ct. at 1437. In the *Zwickler* case, supra, this Court said:

> "In *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, we again empha-

> sized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim."

389 U.S. at 251, 88 S.Ct. at 397. In a footnote, the Court added:

> "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is *obviously* susceptible of a limiting construction. [Numerous citations]." (emphasis added).

389 at 251, 88 S.Ct. at 397, fn. 14.

The abstention doctrine, section 1983, and the interrelationship between the two has also been before the Fifth Circuit with great regularity. In *Moreno v. Henckel,* 431 F.2d 1299 (C.A. 5, 1970), the Fifth Circuit exhaustively analyzed the Supreme Court cases cited in the foregoing pages, and concluded that *Monroe,* supra, *McNeese,* supra, and *Zwickler,* supra, controlled their decision in *Moreno.* That case is virtually identical to the instant case, since in *Moreno* the plaintiff was alleging an unlawful discharge from public employment based on his exercise of protected rights under the First and Fourteenth Amendments. The suit was brought under 42 U.S.C. 1983.

What respondent sought in the District Court was determination of the question of whether his dismissal from employment by defendants herein violated the Fourteenth Amendment. If the District Court's decision to abstain is left standing, the resulting effects will be that plaintiff will never have his day in court on the merits of his Constitutional claim; and the path will be cleared for other District Courts to avoid section 1983 claims simply by

searching for general statutory authority on which an interpretation of an existent "state action" might rest, whereupon, an artificial factual or legal distinction between the subject problem and similar state court decisions might be found, "causing" the trial court to hold that the state statute uncovered by the District Court's diligence is unsettled, and, therefore, forcing abstention. Surely the high purposes of the abstention doctrine were never meant to effectively deny a federal decision on a federal Constitutional question.

The Fifth Circuit's reversal of the District Court's decision to abstain is not in conflict with other circuits. The issue of imposing grooming regulations on *students* is only abstractly if at all present in this case, and the conflict in the circuit courts on that issue does not constitute an adequate reason for the grant of certiorari in this case.

CONCLUSION

For the reasons stated above, respondent says that a Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of March, 1973, three copies of the Brief in Opposition were mailed, postage prepaid, certified, return receipt requested, to Mr. B. Jeff Crane, Jr., Attorney at Law, First City National Bank Building, Houston, Texas, 77002, Counsel for the Petitioner.

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